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In the Supreme Court of the United States

OCTOBER TERM 1972

No. .....

PACIFIC MARITIME ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; CHARLES M. HENDERSON, Regional Director of Region 19 of the National Labor-Relations Board, for and on behalf of the National Labor Relations Board; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 701; and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION LOCAL 50,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner, Pacific Maritime Association (PMA) a California non-profit corporation that acts as the collective bargaining representative of the employers of longshoremen on the West Coast, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 14, 1972. [Appendix 21-30], as to which that court denied a rehearing on April 26, 1972 [Appendix, 31].

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 457 F.2d 572. It is set out in the Appendix 21-30. The decisions and orders of the district court are not reported. They are set out in the Appendix, 32-34.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 4, 1972, and a timely petition for rehearing was denied on April 26, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the unique procedure of § 10(k) of the Act - under which a "jurisdictional dispute" charge must lead to a final and binding Board order and is to be dismissed upon "compliance by the parties to the dispute with the decision of the Board" - preclude a dismissal of the charge after litigation and issuance of an order but before there is "compliance" by some of these parties?

2. Is judicial review of a § 10(k) order of the Labor Board available to the employer who filed the charge giving rise to the § 10(k) hearing, who lost before the Board after active participation in the hearing, and who is grieviously injured by the order?

3. Does the Act provide any governmental sanction to enforce a Board § 10(k) order that the law provides shall be final and binding?

4. Is a Labor Board § 10(k) decision determining a jurisdictional dispute an "order" of the Board so that, under § 10(e) of the Act, it may be directly enforced by a court decree against the unions and the employer involved?

THE STATUTE INVOLVED

This petition involves only the meaning of statutory provisions for disposing of "jurisdictional" or "work assignment" disputes involving unions and employers that give rise to "economic violence"[1]. These are set out in the National Labor Relations Act, herein "the Act", 29 U.S.C. § 151ff. The principal statutory provisions involved are those setting up the special procedure to be followed by the Board, § 10(k) of the Act, 29 U.S.C. § 160(k), and those providing for ancillary injunctions, § 10(l) of the Act, 29 U.S.C. § 160(l). The jurisdiction and power of the courts of appeal with respect to these matters after issuance of a Board order are set out in § 10(d), (e) and (f) of the Act, 29 U.S.C. § 160(d), (e) and (f). Also involved are § 10(b) and (c) of the Act, 29 U.S.C. § 160(b) and (c), and § 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D). These provisions are set out at pages 1-7 of the Appendix.

STATEMENT OF CASE

PMA asserts that there was premature action purporting to terminate the administrative adjudication process.

In April, 1969, a matter was brought within the jurisdiction of the Labor Board by charges of PMA and the operating engineers' union. These stated that the operating engineers' union and the longshoremen's union, respectively, had each engaged in "economic violence" in regard to an underlying dispute as to whether longshoremen or operating engineers should drive certain cranes at Astoria, Oregon, in the course of carrying on the longshore work of loading logs aboard vessels moving in foreign commerce. This mat-

1. By "economic violence" we shall herein mean the various types of activity that are unfair labor practices when engaged in for any of the four objects specified in § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 8(b)(4) [Appendix, 1].

ter was the subject of a hearing under § 10(k) of the Act, 29 U.S.C. § 160(k). The PMA participated as an active party throughout the hearing on the matter. The Board entered an order denying the PMA's contention that the work should be done by longshoremen. Although this order was patently unlawful, the General Counsel of the Board thereafter dismissed PMA's charge on the ground that this § 10(k) order of the Board legalized "economic violence" by the operating engineers' union to support the Board's unlawful order.

The PMA sought judicial review of the § 10(k) order and of the dismissal of its charge. In response the Board asserted that PMA was a non-neutral employer not entitled to protection under the Act's provisions and hence was not entitled to judicial review of the adverse orders despite the grievous injury resulting from the unleashing of "economic violence" against it on the basis of the governmental action in entering the adverse § 10(k) order and dismissal order. The court of appeals accepted these contentions, rejecting the arguments of PMA based on the Act, the Administrative Procedure Act and the due process clause of the Constitution. PMA asserts the charge remains before the Board.

PMA asserts that the district court still has jurisdiction to maintain its injunction.

Prior to the beginning of the § 10(k) hearing, the Labor Board obtained an injunction under § 10(l) of the Act against economic violence on the part of either the longshoremen's union or the operating engineers' union with respect to this matter. When the Board issued the award against the PMA and in favor of the operating engineers' union, the district court was asked to free that union of the injunction. The district court refused to do so on the ground that the Board had not as yet issued its final adjudication

with respect to the matter. The union appealed this order to the Ninth Circuit.

In the interim, the Board held a *pro forma* hearing, purportedly under § 10(c) of the Act, with respect to whether or not the longshoremen's union had engaged in unfair labor practices in seeking to get the work in dispute. On the § 10(k) record, the Board entered a pre-judged order holding that the longshoremen's union had committed unfair labor practices because the § 10(k) decision was against it. This fact was brought to the attention of the court of appeals in its consolidated hearing with respect to the PMA appeal from the dismissal of its charge and the operating engineers union's appeal from the refusal of the district court to permit it to use economic violence to obtain the work in dispute at this time.

PMA asserts that the district court retains jurisdiction to keep its injunction in effect because the Act states that there can be no "final adjudication" as to the matter by the Board except by dismissal of the charges after compliance with the order stemming from the § 10(k) proceedings. PMA points out that § 10(k) of the Act, under which this matter was litigated before the Board and hence came within the district courts § 10(l) injunction jurisdiction, provides for a final adjudication in the form of a dismissal of the charges against the unions as follows:

> "Upon compliance by the parties to the dispute with the decision of the Board . . ., such charge shall be dismissed."

The Labor Board and the operating engineers' union claim that deficiencies in the Act's provisions for enforcing orders under § 10(k) require that this language be disregarded and that the "unless" clause in § 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D), be distorted to validate a premature dismissal of PMA's charge as the Board's "final adjudication" on the matter.

PMA asserts that the statutory provisions provide a unique administrative-adjudicative procedure for jurisdictional dispute issues.

The Taft-Hartley amendments to the Act, 29 U.S.C. §§ 151 et seq., include provisions intended to dispose of the intolerable problem existing because, in disputes among unions and employers as to what class of worker would be assigned work claimed by each of two or more unions to be within "its jurisdiction", the Wagner Act permitted use of economic violence. The House bill leading to these amendments sought to dispose of this problem simply by making it an unfair labor practice to use "economic violence" where "an object thereof" is to get the work assigned to one class rather than to another class. The standard procedures for dealing with unfair labor practices were applicable in the House bill. Senator Wayne Morse, referring to his War Labor Board and West Coast longshore arbitration experience, attacked this stereotype approach to this difficult problem. He drafted a radical and unique procedure to supplant the standard unfair labor practice administrative process and administrative-adjudication process. A Senate amendment, concurred in by the House, accepted almost all of the Morse language and did provide a special and unique procedure for the Board's administrative process and administrative-adjudication process as to charges that "economic violence" has been used in such a "work assignment" or "jurisdictional" dispute.

These special administrative and administrative-adjudicative procedures are set out in § 10(k) of the Act, 29 U.S.C. § 160(k) [Appendix 6]. The purpose of these "was to set up machinery by which the underlying jurisdictional dispute would be settled."[2] The opinion below overrides the

2. *Labor Board v. Radio and Television Broadcast Engineers Union* (CBS), 364 U.S. 573, 581 (1961) [herein *"CBS"*].

Congressional intent that the dispute be settled by use of the § 10(k) machinery, for it permits it to remain open and unsettled.

This machinery added by the Senate amendments to the bill is unique because, first, its administrative process is set up in language that is in sharp contrast with the pre-existing language. This grants the Board a discretionary power to proceed or not proceed, which applies as to all other types of charges. Note § 10(b) of the Act, 29 U.S.C. § 160(b) [Appendix, 3]. In § 10(k) however, the Board is "empowered and directed to hear and determine the ["jurisdictional"] dispute out of which such unfair labor practices shall have arisen", unless the § 10(k) procedure is aborted by agreement of "the parties to such dispute."[3] Thus the administrative process includes a mandatory duty to institute administrative-adjudication on a "jurisdictional dispute" charge having some merit that is not mooted by such an agreement.

The § 10(k) machinery is unique because, second, the administrative-adjudicative process of § 10(b) and (c) is not applicable to "jurisdictional" disputes or charges arising out of them. A unique type of order is to be issued. The § 10(k) procedure does not lead to an order that a union cease and desist from unfair labor practices; rather the Board is directed to enter a decision to determine the underlying dispute. Its final adjudication is defined in the last sentence of § 10(k): "Upon compliance by the parties to the dispute with the decision of the Board . . ., such charge shall be dismissed."

The judicial process for adjudication on the merits is set out in § 10(d), (e), and (f) of the Act, 29 U.S.C. § 160(d), (e) and (f) [Appendix, 4-5]. This procedure applies to

3. *Cf. Labor Board v. Plasterers' Union*, 404 U.S. 116 (1971). [Herein "Plasterers"].

the Board's § 10(k) order in the same way it applies to a Board order under § 10(c). Subsection (d) permits the Board to modify any finding or order up to the time that the record in the case is filed in court. Subsection (e) permits the Board to obtain a decree from a court to enforce any order issued by it. Subsection (f) gives any person who is aggrieved by a final order of the Board the right to initiate court review of the Board order by action independent of the Board's power to proceed in court for enforcement of any order.

The district courts have an ancillary power to grant injunctive relief under § 10(l) of the Act, 29 U.S.C. § 160(l). With respect to the matter before it under § 10(k), the Board is given the power and duty to seek injunctive relief "pending final adjudication of the Board with respect to such matter" where this is "appropriate". The district court is given jurisdiction to grant the injunctive relief that it "deems just and proper". [See Appendix, 6-7].

PMA asserts that there is no need to twist the statutory language.

The law provides a simple and orderly process for making Labor Board § 10(k) decisions binding on all concerned. The Act states, in § 10(k), that the Labor Board "is empowered and directed to hear and determine the dispute out of which" the unfair labor practice charge shall have arisen [unless the Board's § 10(k) procedure is aborted by a voluntary agreement of the parties to the dispute]. The result is an order of the Board. Under § 10(e) of the Act, 29 U.S.C. § 160(e), the Board has power to obtain a court decree for the enforcement of any order made or issued by it. This decree will provide a governmental sanction that will make the Board's order binding on all concerned and will cause "compliance by the parties to the dispute with the decision of the Board" to occur. Thereupon, under the last sentence of § 10(k), the charges are to be dismissed.

REASONS FOR GRANTING THE WRIT

This petition asserts that the Board is refusing to utilize the fundamental structure of the adjudicative process set up by Congress to eliminate economic violence as a means of communication in "jurisdictional" or "work assignment" disputes among labor unions and employers. It is refusing to use the governmental sanctions directly available to make its orders determining these disputes binding upon all concerned. In doing so, it precludes the non-neutral employer from judicial review of the order against it that unlawfully assigns the work to the wrong class of workers.

This Court should devote much of its time to questions as to whether government is using the fundamental structures of the adjudicative process in accordance with the applicable statutes and the Constitution. It must act as the great generalist to see that the experts are using these structures as required by law. In doing so, it should sit to stamp out governmental habits that have become ingrained and persist as conditioned reflexes developing out of narrow, esoteric expertise in an irrelevant frame of reference. The economic consequences of anarchy in these disputes magnifies the importance of the task of overview that must lead to a decision that the process of governmental adjudication include the use of the governmental sanctions made available by Congress.

The development of our civilization depends upon the use of orderly processes of law to resolve disputes and upon the use of governmental sanctions to support governmental resolution of disputes where these are provided by Congress. The anarchy of self-help is to be stopped where Congress has declared it to be intolerable and has provided a substitute for it. The Labor Board refuses to see the simple procedure Congress directed that it follow to eliminate this anarchy, apparently because it is a little different from the

procedures it uses in other controversies and because economic violence is a time-honored technique of labor unions.

The refusal of the Labor Board to substitute the § 10(k) procedure for its traditional procedure led to this Court's opinion in *CBS*. That opinion did part of the job. However, the Board persists in pursuing unfair labor practice issues instead of resolving the underlying disputes with binding effect, as Congress directed. The job needs to be finished, and at the same time the non-neutral employer's right to judicial review of a work assignment order against it should be confirmed.

The opinion below is in conflict with this court's opinion in CBS.

In *CBS* this Court took action to correct the Board's disinclination to proceed in "jurisdictional" disputes by using the powers provided in § 10(k) in place of its usual unfair labor practice adjudicative processes. *CBS* held that the Board is to enter an order that is a final and binding determination of the underlying dispute and is not to enter orders to cease and desist from the unfair labor practices arising out of the dispute. It holds that the order should bind the employer and the unions. It points out that the Board is to obtain compliance with its order and is to dismiss the charges when this has been done.

The court below holds that the Board may dismiss a charge before compliance has been obtained, that there is no governmental sanction to make the Board's order binding on the unions or the employers, that the pressures of the two unions should be permitted to impose their conflicting forces upon the employer with the employer free to act within the area – if any – between these forces, and that the Board should proceed only to get a cease and desist order against one union's unfair labor practices while leaving the work assignment order without binding effect on either union.

It thus leaves the particularly difficult work assignment disputes for resolution through economic anarchy, a method of resolution that *CBS* said was not to be permitted.

The opinion below is in conflict with this Court's holding in Plasterers, 404 U.S. 116 (1971). While language in the opinion in that case is cited and quoted in the opinion of the court of appeals, this does not establish that the holdings are compatible. Furthermore, the court of appeal's opinion – 440 F.2d 174 – which was reversed by this Court, is twice cited as authority in the opinion giving rise to this petition.

The language from *Plasterers* in this Court that is relied on below does not set out any holding of this Court. It is merely a description of how the Board is proceeding, language taken by all participants here as describing the assumed facts of the procedure under consideration. This language did not develop through the clarifying process of briefing and arguing litigated issues of fact or law. As indicated by f.n. 19, 404 U.S. at 127, this Court was describing what the Board was "apparently" doing and was relying on the Board's statements in its briefs that were not controverted in the many other briefs before this Court in that case.

The Board makes a simple situation very complicated. The Board semantically tortures § 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D), to squeeze and stretch the decription of the § 10(k) order, which determines which class of workers is entitled to a disputed work assignment, so as to say that it is an order "determining the bargaining representative" for those performing the work.[4] The

4. Here the longshoremen are "performing the work". The § 10(k) order certainly does not say that the operating engineers' union represents these longshoremen.

Board's brief admits that it was ignoring the directive of *CBS* that the § 10(k) order shall have binding effect and shall permanently decide and terminate the underlying dispute. The "design of the Act" is said to include the holding of *pro forma* hearings under § 10(c) of the Act, 29 U.S.C. § 160(c), as to unfair labor practice issues that Congress and the *CBS* opinion say are not to be litigated. The Act is said to authorize the holding of pre-judged hearings leading to boiler-plate cease and desist orders that will merely trigger changes in the rules for using "economic violence" and will not eliminate it. The Board's assertion that this is the only "design" it can find in the statute indicates that its expertise is handicapped by myopic vision or that its concentration on its traditional procedures has worn the rut so deep that it cannot see the flat land outside.

Once it is recognized that § 10(c) authorizes court decrees to enforce § 10(k) orders so as to give them binding effect through governmental sanctions, the complications disappear. The simple design of the Act is obvious:

> If the parties to the dispute do not all comply with the § 10(k) order, the Board is to go directly to court for a decree enforcing this order. Compliance will then be compulsory. Efforts to evade or escape the order, by anyone in the case, will be unlawful and punishable as contempt. The pressures for change will disappear. The charges will be dismissed "upon compliance by the parties to the dispute". The district court injunction will then be dissolved.

This true "design" of the Act establishes that the holding in *Plasterers* is correct. And it is a simple design.[5]

---

5. We articulate our two radical, revolutionary premises: First, it is all right for the Labor Board to decide that a group of workers do not own some work that they claim and for the government to require the union involved to live with that decision. Second, after twenty-five years it is all right for the Board to give up the § 10(k) vestige of its years of effort to frustrate Mr. Taft and Mr. Hartley. These may be as simplifying as the suggestion that humans of both sexes find copulation to be pleasurable. See *Elaine Morgan, The Descent of Woman*, 73-94, esp. 82-83 (1972).

In the proceedings below, detailed argument was presented to the court of appeals asking that it examine the legislative language and history and reach a conclusion as to the "design of the Act" based on litigation of the issues. The easy answer appeared when this Court's language became public. But in grasping at this, the holdings of this Court in *Plasterers* were over-looked.

The court of appeals says that PMA should accept, at least for the time being, the effects of the arbitrary, unlawful order of the Board and ignore the sore injury to its substantial economic interests at stake in this litigation. Citing the Plasterers court of appeals opinion, *inter alia,* it goes on to say that this would serve "one of the principal purposes of these provisions, namely, protection of a neutral employer", Appendix 28. In short, it holds that PMA is to sacrifice its financial stake and assume the status of a neutral in the dispute. However, this Court held in *Plasterers* that the non-neutral employer with a substantial stake in the outcome of the § 10(k) proceeding is entitled to the protection of the Act against "jurisdictional" disputes, 404 U.S. at 130.

The court of appeals denies the employer the status of one of "the parties to the dispute". Thus it holds that the employer's charge, after it has led to litigation and an order against the employer, can be dismissed while the employer is refusing to comply with the order pending a court decree enforcing it, Appendix 26-28. To the same effect, it states that action by only the "opposing union" and the successful union will provide "compliance by the parties to the dispute" with the § 10(k) order. In *Plasterers,* however, this Court held that the employer is one of "the parties to the dispute" to be settled in the § 10(k) proceeding, 404 U.S. at 125-133.

The court of appeals treats the PMA as a "dispensable neutral" in a proceeding that the Board has a mandatory duty to carry on. Thus the employer is denied judicial review of the arbitrary orders of the Board. Although the dismissal of PMA's charge is based on litigation stemming from the charge leading to an unfavorable decision against PMA and although a grevious injury will be imposed on PMA by the dismissal if the district court injunction is dissolved on the ground the dismissal is lawful, this dismissal is said to be "not reviewable" just as if the Board were under no mandatory duty to hear the issues raised by the charge, Appendix 29-30. So too, the efforts of PMA to get an independent review of the § 10(k) order were frustrated by the holdings that PMA can get into court only by intervening in a proceeding involving the unsuccessful union. While the court of appeals leaves the employer with an opportunity to ride the coat-tails of the unsuccessful union whenever there has been a charge against it, the employer is left riding the ghost ship of Der Fliegende Hollander whenever a charge has been filed against only the successful union. Yet, in *Plasterers* this Court specifically rejected the argument that the employer has no independent status and is to be regarded as "a dispensable neutral", 404 U.S. at 133.

The opinion of the court below is in conflict with the opinion of this Court in Labor Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, 47 (1937). This Court there sustained, against a due process attack, the procedural provisions of the Act with respect to hearings carried on under § 10(c), 29 U.S.C. § 160(c). The Court points out that the Act establishes standards and calls for a pleading, notice of hearing, the receipt of evidence and the making of findings as the basis for an order. The opinion continues (47):

> "The order of the Board is subject to review by the designated court, and only when sustained by the Court may the order be enforced. Upon that review all the questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the Court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to adminisrative agencies set up by Congress to aid in the enforcement of valid legislation."

The opinion below permits the Board's arbitrary § 10(k) order to be enforced before court review, and so as to deprive the employer of its property without due process of law.

Protection from an arbitrary § 10(k) order is required by the due process clause because the order is entered in a proceeding in which the employer is a statutory party and it is the basis for governmental action granting a union the privilege of using otherwise unlawful "economic violence" against the property of the employer and terminating the statutory protection to "the employer from the economic havoc of jurisdictional strikes". Compare 404 U.S. 128. This governmental grant of privilege, essentially letters of marque to use violence against a citizen not an outlaw or an enemy, will cause "intense pressure" to be applied on the employer. See 404 U.S. 127. The grant is based on how the adjudication of the Board turned out, i.e., whether the employer was successful or unsuccessful in his position in the litigation. Compare 404 U.S. at 124, 127.

The opinion below thus deprives the employer of the right to judicial review of an administrative adjudication that has an immediate grevious adverse effect on the PMA

member who has substantial financial stakes in the outcome of the § 10(k) proceeding. The holding conflicts with the due process clause and the *Jones and Laughlin* holding of this Court. Futhermore, it conflicts with the essence of *Plasterers,* which is that the employer has sufficient status in the § 10(k) proceeding as to be a party entitled to the statutory protections, including the right to have the Board proceed in accordance with law unless it voluntarily concurs in an agreement with the unions involved to abort the Board's § 10(k) processes.

CONCLUSION

Work preservation issues and jurisdictional disputes will become more acute in the readjustment of the economy at the end of the Vietnam incident. The stakes involved will become greater. The use of adjudication should be encouraged in labor relations. The claim of nonreviewable power by the Labor Board can only dissuade use of the Board to avoid economic anarchy. This Court should carry out its overseeing function to require the Board to adopt a permanent policy of reviewing its adjudicative processes to find ways to make them more useful to society. The court of appeals opinion encourages sloth and inertia in government. In this Court resides the reserve of power that can keep adjudication at work. This petition asks that the Board take a vigorous and fresh look at how it conducts its affairs. The writ should issue.

Respectfully submitted,

RICHARD ERNST
Attorney for Petitioner
Pacific Maritime
Association

June 22, 1972

Appendix A

Title 29 United States Code

§ 158. Unfair labor practices

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

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Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * *

§ 160. Prevention of unfair labor practices—Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be,

responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or

setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or

restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides

or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES M. HENDERSON, Regional Director of Region 19 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Appellee,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,

Appellant.

No. 24,285

[December 11, 1969]

Appeal from the United States District Court for the District of Oregon

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Before: HAMLEY and HUFSTEDLER, Circuit Judges, and LEVIN, District Judge*

HAMLEY, Circuit Judge:

This is an appeal from a district court order granting a temporary injunction pursuant to a petition filed on behalf of the National Labor Relations Board (Board) under section 10(l) of the National Labor Relations Act, as amended (Act), 29 U.S.C. § 160(l).

The essential facts are not in dispute and the summary thereof, set out below, is taken largely from the Board's brief on this appeal. Pacific Maritime Association (PMA) is an association of employers engaged in shipping, stevedoring and terminal business at ports in California, Oregon and Washington. Among its

*The Honorable Gerald S. Levin, United States District Judge for the Northern District of California, sitting by designation.

members are Brady Hamilton Stevedore Company (Brady) and W. J. Jones & Sons, Inc. (Jones), both of which are engaged in loading logs on vessels at the Port of Astoria, Oregon. Both employ longshoreman who are members of, or are represented by International Longshoremen's and Warehousemen's Union Local 50 (Longshoremen). PMA and Longshoremen are parties to an existing collective bargaining agreement the terms of which are binding upon Brady and Jones.

Since November, 1966, Brady has leased waterborne cranes, also known as floating whirley cranes, from Willamette-Western Corporation (Willamette) under bareboat charter agreements, for use in Brady's Astoria operations. Under these arrangements, Willamette provided Brady with employees to man the cranes. These employees were furnished to Brady on a "loaned" basis, and during the time of such "loan," they were to be "deemed for all purposes the employees of [Brady]." The employees received their wages from Willamette, which billed Brady for "labor costs referable to such employees." Pursuant to similar arrangements, Jones leased water-borne cranes from General Construction Company (General) for use by Jones in its Port of Astoria operations.

The crane operators and oilers furnished by Willamette and General under these arrangements were members of, or represented by, International Union of Operating Engineers Local 701 (Engineers). Willamette is a party to a collective bargaining agreement with Enginers, and General is bound by a collective bargaining agreement between Engineers and Associated General Contractors of America, an employer-association. Neither Willamette nor General has ever been a party to a collective bargaining agreement with Longshoremen. At no material time has Engineers been certified by the Board as the collective bargaining representative of the employees of Brady or Jones; nor has Longshoremen been certified as the bargaining representative of the crane operators employed by Willamette, General, Brady or Jones.

On the morning of April 3, 1969, crane operators engaged in Brady's and Jones' operations at Astoria swung the cranes into position preparatory to loading logs aboard ships. At this point the longshoremen employed by Brady and Jones refused to hook

up the logs to the crane hooks, thereby bringing the operations to a halt. The longshoremen claimed that they, rather than the employees represented by Engineers, were entitled to the work of operating the water-borne cranes. They engaged in this work stoppage in furtherance of that claim.

Brady and Jones capitulated to the longshoremen's demand and, that same day, told the employees who had been furnished by Willamette and General to leave the barges so that the longshoremen could take over. Brady and Jones then resumed loading the logs by utilizing ship's gear operated by the longshoremen until the latter could be trained to operate the water-borne cranes.

Engineers made several efforts to have Brady restore employees represented by Engineers to work on the water-borne cranes. Being unsuccessful in this, Engineers filed with the Board, on April 8, 1969, the unfair labor practice charge which gave rise to the instant proceeding. Engineers alleged, in effect, that Longshoremen had violated section 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D) by utilizing a work stoppage to force Brady to assign the disputed work to employees represented by Longshoremen.

On April 19, 1969, Engineers commenced picketing Brady's operations in the Port of Astoria. This led PMA to file with the Board on April 21, 1969, an unfair labor practice charge against Engineers, the second charge involved in this proceeding. PMA alleged that Engineers' picketing was in violation of section 8(b)(4)(D) of the Act insofar as it was intended to force PMA members engaged in stevedoring operations at Astoria to assign the work of operating water-borne cranes to employees represented by Engineers.

Engineers then demanded that Jones restore employees represented by Engineers to work on the water-borne cranes. Being again unsuccessful, Engineers, on April 23, 1969, filed the third and last unfair labor practice charge growing out of the Astoria incident described above. This charge was similar to the charge Engineers had filed against Brady on April 8, 1969.

In the meantime, on April 22, 1969, Engineers extended its picketing to Brady's operations in Portland, Oregon. Engineers

also continued picketing activity in Astoria on April 23 and 24, 1969. This picketing activity resulted in work stoppages by tugboat personnel at Astoria and by construction employees and employees of the Dock Commission at Portland.

After investigation, the Board concluded that there was reasonable cause to believe that both Engineers and Longshoremen were violating section 8(b)(4)(D) and that a notice of hearing based on the three charges referred to above should issue pursuant to section 10(k) of the Act, 29 U.S.C. § 160(k). The Board also concluded that an application for injunctive relief against both unions under section 10(l) of the Act, 29 U.S.C. § 160(l), was appropriate.

Accordingly, on May 6, 1969, acting on behalf of the Board, Charles M. Henderson, Regional Director of Region 19 of the Board, filed a petition for an injunction in the district court. Answers were filed by Engineers and Longshoremen. PMA filed a "Supplementing Petition of Charging Party," agreeing with the Board insofar as the latter sought an injunction against Engineers. Numerous affidavits were filed, followed by oral argument[1]

The district court found reasonable cause to believe that Longshoremen, by its work stoppage of April 3, 1969, violated section 8(b)(4)(D) of the Act. The court also found that Engineers, by its picketing on and after April 19, 1969, engaged in conduct proscribed by section 8(b)(4)(D) in order to force Brady and Jones to assign the work of operating the water-borne cranes to employees represented by Engineers. The district court concluded that "continuation of these practices will impair the policies of the Act," and that an order enjoining both unions "is appropriate, just and proper . . . (t)o preserve the issues for the orderly determination as provided in the Act."

The court enjoined each union, pending disposition of the unfair labor practice charges by the Board, from engaging in conduct proscribed by section 8(b)(4)(D). Thus, no conduct would be permitted which could require or force Brady, Jones

[1]In addition to counsel for the Board, the two unions and PMA, the district court permitted counsel for Brady, Jones, Willamette, General and the Commission of Public Docks to participate in the argument.

or any other employer-member of PMA, or any other employer in the Astoria area, to assign the work in question to employees who are members of or are represented by one union rather than the other union. Only Engineers has appealed.[2]

Engineers argues that its picketing activity against Brady was lawful because it was for the sole purpose of protesting Brady's wrongful action in discharging the crane operators represented

[2]In this court Warehousemen, designating itself "Respondent and Appellee," and PMA, designating itself "Charging Party—Appellee" have filed briefs in support of the Board order insofar as that order enjoins Engineers. The Board objects to Warehousemen and PMA designating themselves as appellees but states that it does not object to each such brief being considered as from *amicus curiae*. PMA, on the other hand, asserts that, as a charging party, it is entitled to appear in this court as an appellee in support of portions of the Board order.

The Board applied to the district court for this injunctive relief pursuant to section 10(l) of the Act. Under that section, any person involved in the charge is entitled to appear in the district court by counsel and to present relevant testimony. If the order entered by the district court aggrieves any such party, it undoubtedly has the right to appeal, as Engineers has done here.

However, only the Board may seek injunctive relief under section 10(l), and, as to others, the Norris-LaGuardia Act, 29 U.S.C. §§ 107-115 specifically prohibits the issuance of injunctions in labor disputes except under circumstances not here present. PMA relies on *Automobile Workers v. Scofield*, 382 U.S. 205 (1965), as authority for its right to appear here as appellee. But that was not a temporary injunction proceeding under section 10(l). The Supreme Court there dealt solely with the right of a party named as the respondent in an unfair labor practice charge, and of the party filing the charge, to intervene in a court of appeals review of an enforcement proceeding involving a final Board order.

In *Retail Clerks Union v. Food Employers Council, Inc.*, 351 F.2d 525 (9th Cir. 1965), the problem under discussion was broached but not decided. In *San Francisco-Oakland Newspaper Guild v. Kennedy*, this court entered an unreported order on May 20, 1969, rescinding an earlier order insofar as the earlier order permitted the intervention of the charging party in a section 10(l) proceeding. In *Sears, Roebuck & Co. v. Carpet, Linoleum, Soft Tile and Resilient Foor Covering Layers, Local Union No. 419, AFL-CIO*, 410 F.2d 1148 (10th Cir. 1969), the court employed a rationale which is adverse to the position of PMA here in holding that where the Board chose not to appeal from a district court order denying a petition for a section 10(l) injunction, the charging party had no standing to appeal.

We conclude that neither PMA nor Longshoremen has standing as an appellee, but we authorize their appearance here as *amicus curiae*. The caption of this case has been recast to reflect this holding.

by Engineers. According to this view, the picketing activity against Brady did not have a jurisdictional objective and the jurisdictional proceeding before the Board would continue without interference. Engineers urges that they were only exercising the right of free speech. In essence, what Engineers is saying is that its picketing against Brady was not for the purpose of effectuating a permanent solution of the jurisdictional dispute in its favor, but merely for the purpose of restoring to their jobs crane operators represented by Engineers while the Board is resolving the jurisdictional dispute.

We agree with the district court and the Board that the objectives of picketing may not be segmented in this fashion. Section 8(b)(4)(D), with exceptions not here relevant, makes it an unfair labor practice to engage in picketing where an object thereof is to force or require an employer to assign particular work to employees in a particular labor organization. The statute draws no distinction between a purpose to accomplish a permanent assignment of employees and a purpose to accomplish a temporary reassignment in the form of a restoration to former employment pending a permanent solution of the problem.

The reason why no such distinction is drawn in the statute is apparent. Whether the objective is temporary or permanent replacement of employees, the employer is caught in the middle between two competing unions. Picketing by one union to force an employer to displace employees represented by another union for the purpose of reinstating employees represented by the picketing union, is as detrimental to the employer and the public as is picketing to accomplish a permanent realignment. Thus to permit Engineers to picket Brady on the theory that it has a right to protest the alleged wrongful discharge of its members would frustrate the Congressional scheme of promoting orderly resolution of such disputes.

Assuming, as Engineers contends, that its crane operators had a contractual right to the work in question, this would not make the dispute any the less a jurisdictional dispute within the meaning of section 8(b)(4)(D). See *N.L.R.B. v. Radio Engineers*, 364 U.S. 573, 579, 584 (1961). Any contract rights Engineers may have in this respect will be relevant factors to be con-

sidered by the Board in resolving the underlying jurisdictional dispute. See *International Assn. of Machinists, Lodge 1743*, 135 NLRB 1402, 1410-1411 (1962).[3]

Appellant contends that, apart from the posting of a banner against Jones for about one hour on the morning of April 23 or 24, the evidence shows no picketing or other coercive activity against the company. Accordingly, Engineers urges that the district court erred in not excluding Jones from the scope of the injunction.

While Engineers picketed Jones for only a brief time, Engineers, Longshoremen and the employers all regarded the dispute as involving Jones as well as Brady. The arbitration proceedings between PMA and Longshoremen were initiated by Jones. Engineers made written demands upon Jones as well as Brady for reinstatement of its crane operators. The jurisdictional controversy involving the two companies arose at the same time, encompassed the same issues and involved the same unions. Under these circumstances we believe that the district court was warranted in formulating injunctive relief without distinguishing between Brady and Jones. If Engineers has no intention of picketing Jones it is not aggrieved by the order insofar as it forbids picketing against that company.

Engineers argues that the district court erred in granting injunctive relief because Brady and Jones, who benefit by the decree, have unclean hands. In support of this view, Engineers asserts that both Brady and Jones violated section 8(a)(3) and (5) of the Act, 29 U.S.C. § 158(a)(3) and (5), when they discharged the crane operators represented by Engineers. In particular, Engineers asserts that Brady: (1) did not follow procedures available to it under the contract with Longshoremen which provide for arbitration; (2) did not follow procedures available to it under the Act to seek an immediate injunction against Longshoremen pursuant to section 10(l); and (3) fired

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[3] *IBEW Local 292, AFL-CIO and Franklin Broadcasting Co.*, 126 NLRB 1212 (1960), and *Siegel v. Local 399, Service Employees* (C.D. Calif. 1968) 70 LRRM 2421, cited by Engineers, did not involve jurisdictional disputes between two unions.

the experienced and skilled crane operators represented by Engineers and replaced them with unskilled trainees.[4]

Whether Brady or Jones violated section 8(a)(3) or (5), or acted unlawfully in any other respect, are factors to be considered in the unfair labor practice proceeding now pending before the Board. Neither the district court nor this court should prejudge that issue in this injunction proceeding under section 10(l). Moreover, if it be assumed that Brady or Jones did engage in unfair labor practices by violating section 8(a)(3) or (5), or otherwise, injunctive relief under section 10(l) would not thereby be foreclosed. In the present case, the Board, and not Brady or Jones, is the petitioner seeking the injunction. The Board is acting, not on behalf of the employers or either union, but in the public interest. In our opinion the "unclean hands" defense is not available against the Board under the facts of this case.

Closely akin to this argument is Engineers' contention that to issue an injunction against it under the circumstances of this case would reward the "illegal force" used by Longshoremen and is therefore unconscionable. The thrust of this argument, insofar as it is distinguishable from Engineers' "unclean hands" argument, seems to be that the injunction under review does not preserve, but in fact thwarts the return to, the *status quo* pending the Board decision in the unfair labor practice proceedings.

Engineers cite *Westinghouse Electric Corp. v. Free Sewing Machine Co.*, 256 F.2d 806, 808 (7th Cir. 1958), for the proposition that the *status quo* is the last uncontested status which preceded the pending controversy. Engineers urges that restoration of the *status quo* in this case would require that the crane operators represented by Engineers be restored to their jobs with Brady and Jones pending the Board decision. As authority for the proposition that a section 10(l) injunction should not be framed that would disturb the *status quo*. Engineers cites *Minnesota Mining and Mfg. Co. v. Meter*, 385 F.2d 265 (8th Cir. 1967).

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[4]Engineers states that Jones committed all the same "misconduct" as Brady except that Engineers does not know whether Jones accepted and adopted the contract between General and Engineers.

The injunction under review runs against both Engineers and Longshoremen. It does not award the work to either union. It leaves Brady and Jones free, under the protection of the injunction, to assign the work to either union, pending the Board's determination in the unfair labor practice proceeding. If Brady and Jones decide to replace Longshoremen's crane operators with those of Engineers, the injunction protects those employers, Engineers, and the public, from coercive activity by Longshoremen.

Had the district court enjoined only the Longshoremen and left the Engineers free to strike, this would have amounted to an award of the work to Engineers. As before stated, it is for the Board to make this award in the first instance. We agree with the Board's view, as expressed in its brief on this appeal, that the Congressional intent in enacting section 10(l) was not, as Engineers contend, to restore the *status quo ante litem* of the employees, but to prevent disruptions to commerce as a result of jurisdictional strikes and other unfair labor practices covered by that section.

Moreover, if *status quo* is a consideration at all in section 10(l) cases, the *status quo* to be preserved is the employer's right to make work assignments without being subjected to continuing strike pressure, pending a Board decision in the unfair labor practice proceedings. That *status quo* is maintained by the injunction here in question.[5]

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[5] *Minnesota Mining and Mfg. Co. v. Meter*, 385 F.2d 265 (8th Cir. 1967), relied upon by Engineers, involved a section 10(j) injunction. In that case it appeared that no injunction was needed to prevent irreparable harm to the union, or to protect the public interest, or to maintain the *status quo*. Moreover, the court cited with approval a case (*LeBus v. Manning, Maxwell & Moore*, 218 F.Supp. 702 [W.D. La. 1963]), in which a section 10(j) injunction altered, rather than preserved, the *status quo*.

Affirmed.

United States Court of Appeals
for the Ninth Circuit

No. 26218

Filed—Jul 29 1970, Wm. B. Luck, Clerk

Pacific Maritime Association, Brady-Hamilton Stevedore Company, and W. J. Jones and Sons, Inc.,

Petitioners,

v.

National Labor Relations Board,

Respondent.

PETITION FOR REVIEW

Pacific Maritime Association, Brady-Hamilton Stevedore Company and W. J. Jones & Sons, Inc., persons aggrieved by the final order of the Board specified below, hereby petition the Court for review of:

1. The order of the National Labor Relations Board purporting to be its determination of a dispute under § 10(k) of the Act, 29 U.S.C. § 158(k), in the Board's consolidated cases 36-CD-54, 36-CD-54-2 and 36-CD-55, which was entered on February 26, 1970, and denominated "DECISION AND DETERMINATION OF DISPUTE", 181 NLRB No. 51;

2. The order of the National Labor Relations Board entered on July 24, 1970, in the aforementioned consolidated cases denominated "ORDER", denying the petition to the Board, by the petitioners named above, asking for a further hearing, calling upon the Labor Board to correct the order entered on February 26, 1970, and asking that it issue "an

order that the ILWU is certified as the bargaining representative for employes performing work of operating barge-mounted floating whirly-type cranes lifting bundles of logs from the water and placing them into the holds of ships and barges at the Astoria, Oregon, operations of Brady [petitioner Brady-Hamilton Stevedore Company] and Jones [petitioner W. J. Jones & Son, Inc.]"

Dated: July 29, 1970.

Respectfully submitted,

Richard Ernst
Counsel for Pacific Maritime Association, Brady-Hamilton Stevedore Company and W. J. Jones & Son, Inc.

P. O. Box 26314
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United States Court of Appeals
for the Ninth Circuit

Filed Sep 29 1970
Wm. B. Luck, Clerk

Pacific Maritime Assn., Brady Hamilton Stevedore Co., and W. J. Jones and Son, Inc., *Petitioners,* v. National Labor Relations Board, *Respondent.*	No. 26,218
International Longshoremen's & Warehousemen's Union, Local No. 50, *Petitioner,* v. National Labor Relations Board, *Respondent.*	No. 26,224

ORDER

Before: HAMLEY and ELY, Circuit Judges.

Upon Respondent's motion, the subject Petitions for Review are dismissed. *See National Labor Relations Board v. International Longshoremen's and Warehousemen's Union,* 378 F.2d 33, 35-36 (9th Cir. 1967).

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Walter Ely

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United States Circuit Judges

In the United States Court of Appeals
for the Ninth Circuit

Filed Nov 16 1970
Wm. B. Luck, Clerk

No. 26,468

Charles M. Henderson, Regional Director of Region 19 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Petitioner-Appellee,

vs.

International Longshoremen's And Warehousemen's Union Local 50,

Respondent-Appellee,

International Union of Operating Engineers Local 701,

Respondent-Appellant,

Pacific Maritime Association,

Charging Party-Appellee,

ORDER

Before: MERRILL and DUNIWAY, Circuit Judges

The motion of petitioner-appellee for summary reversal is denied.

The motion of respondent-appellee to strike the opposition filed by Pacific Maritime Association is denied without prejudice to its renewal before the panel on the merits.

.....

Charles M. Merrill

.....

Circuit Judges

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES M. HENDERSON, Regional Director of Region 19 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner-Appellee,* vs. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION LOCAL 50; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 701, *Respondents,* INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 701, *Appellant.*	No. 26,468
PACIFIC MARITIME ASSOCIATION, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 26,529

[March 14, 1972]

Appeal from the United States District Court
for the District of Oregon

Before: CHAMBERS, KOELSCH, and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

This case raises issues involving the interrelationship of sections 8(b)(4)(D),[1] 10(k),[2] and 10(l)[3] of the Labor Management Relations Act.

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[1]Section 8(b)(4)(D) of the Act, 29 U.S.C. § 158, reads in part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • •

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

• • • • •

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

[2]Section 10(k) of the Act, 29 U.S.C. § 160(k), reads:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

[3]Section 10(l) of the Act, 29 U.S.C. § 160(l) reads in part:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investi-

A dispute arose between the Longshoremen's union and the Operating Engineers' union as to jurisdiction over the work of operating water-borne cranes loading logs aboard vessels at the port of Astoria, Oregon. The jobs were held by members of the Operating Engineers' union. The Longshoremen's union struck, demanding the work for its members. The employers replaced the operating engineers with longshoremen. The Operating Engineers' union then picketed the employers.

The Operating Engineers' union filed charges under section 8(b)(4)(D) against the Longshoremen's union. The employers filed section 8(b)(4)(D) charges against the Operating Engineers' union. The Board instituted section 10(k) proceedings to resolve the jurisdictional dispute between the two unions. The Board also sought injunctive relief under section 10(l) against both unions, and such relief was granted. The Operating Engineers' union appealed. We affirmed. *Henderson v. International Union of Operating Engineers, Local 701*, 420 F.2d 802 (9th Cir. 1969).

The section 10(k) proceeding resulted in a Board decision awarding the disputed work to employees represented by the Operating Engineers' union. The Board held that the Longshoremen's union was "not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employers to assign the above work to longshoremen represented by it." 181 N.L.R.B. 315, 317 (1970). The Longshoremen's union was given ten days to notify the Board whether it would comply. The

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gation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * * In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title."

Longshoremen's union and the employers petitioned the Board for a stay of its decision. The application was denied.

The Longshoremen's union and the employers filed petitions in this court under section 10(f) seeking review of the Board's section 10(k) determination. In an unreported order we dismissed the petitions for lack of jurisdiction, citing *NLRB v. Longshoremen's Union*, 378 F.2d 33, 35-36 (9th Cir. 1967).

In the meantime, following the Board's section 10(k) award of the work to members of the Operating Engineers' union, the Regional Director dismissed the section 8(b)(4)(D) charges against the Operating Engineers' union, and advised the employers that no complaint would be filed on those charges.[4] Armed with this dismissal, the Operating Engineers' union moved for dissolution of the section 10(l) injunction as to it. The district court denied the motion, and the Operating Engineers' union appeals in No. 26,468. An amicus brief was filed on behalf of the employers by the Pacific Maritime Association, an employer association.[5]

The employers also filed a petition (No. 26,529) seeking review of the Regional Director's dismissal of the section 8(b)(4)(D) charges against the Operating Engineers' union, and the Board's refusal to stay its section 10(k) determination awarding the work to members of the Operating Engineer's union. The Board has moved to dismiss the employers' petition on the ground that neither of these administrative actions is subject to judicial review.

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[4]Since the Longshoremen's union had not advised the Board that it would comply with the § 10(k) determination, the Regional Director also filed a complaint under § 8(b)(4)(D) against the Longshoremen's union. While these appeals were pending the Board issued its decision and order in the unfair labor practice proceeding against the Longshoremen's union. The Board confirmed the right to the disputed work of the employees represented by the Operating Engineers' union, and held that the Longshoremen's union had violated § 8(b)(4)(D) by stopping work to force the employers to assign the work to members of that union. 193 N.L.R.B. No. 37 (1971).

[5]The Pacific Maritime Association filed briefs on behalf of the employers in both appeals. For the sake of simplicity we describe their position as that of the "employers."

The Longshoremen's union sought leave to file an amicus curiae brief in No. 26,468. The motion was granted, but no brief was filed.

The basic issue we are asked to decide is whether a union whose members are awarded disputed work in a section 10(k) proceeding remains subject to a section 10(l) injunction unless and until the opposing union has voluntarily acceded to the Board's award or the award has been confirmed by judicial review. The Operating Engineers' union insists that when the section 10(k) award is made and section 8(b)(4)(D) charges against the prevailing union are dismissed, the section 10(l) injunction against that union terminates and it may use economic pressure to enforce the section 10(k) award. The employers argue that voluntary compliance or judicial review must precede economic sanctions.

We resolve this central issue in favor of the Operating Engineers' union in light of the Supreme Court's reasoning in *Sears, Roebuck & Co. v. Carpet Layers Union*, 397 U.S. 655 (1970), and *NLRB v. Plasterers' Union*, ... U.S. ..... (December 6, 1971)—the latter announced after the submission of these cases for decision in this court.

In *Sears* the Supreme Court held that a section 10(l) injunction terminates when the Board decides the underlying unfair labor practice charge. The Court rejected the argument that such an injunction "would remain in effect until the Board's order [was] either enforced or denied enforcement by the Court of Appeals." 397 U.S. at 658. With respect to a situation like that in this case, the Court said, "[w]here the Board ultimately finds no unfair labor practice, it would clearly be contrary to the policies of the Act to permit a district court injunction to remain in effect pending Court of Appeals review of the District Court's action" (659).

The employers argue that *Sears* is inapplicable to this case. They point out that the charge in *Sears* was secondary picketing in violation of section 8(b)(4)(B) rather than a jurisdictional strike in violation of section 8(b)(4)(D), and therefore there was no section 10(k) proceeding in *Sears*. They contend that where the charge is under section 8(b)(4)(D) and section 10(k) is invoked, as here, the "final adjudication of the Board' under section 10(l) is defined by the last sentence of section 10(k). *See* note 2. Admittedly, there has been neither a voluntary adjustment of the dispute nor compliance with the section 10(k) award in this case. Accordingly, the employers argue, their unfair labor

practice charge against the Operating Engineers' union should not have been dismissed, and there has been no lawful "final adjudication by the Board" within the meaning of section 10(l). They conclude that the district court properly refused to vacate the section 10(l) injunction.

The Supreme Court rejected the premises of this argument in *NLRB v. Plasterers' Union, supra.* The Court stated that when the striking union "wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed" (slip opinion, p. 10). This dismissal, the Court noted, "will not be pursuant to the language of § 10(k) directing dismissal upon 'compliance by the parties with the Board's decision' but rather under § 8(b)(4)(D) because the 'employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.'" *Id.* at 10-11 n. 19.

Thus, dismissal of the section 8(b)(4)(D) charge against the Operating Engineers' union was not contingent upon voluntary adjustment of the underlying dispute or compliance with the Board's section 10(k) decision, as the employers contend. Rather, dismissal was required because the employers' disregard of the section 10(k) determination was within the exception to section 8(b)(4)(D), and therefore a strike against the employers was no longer a violation of that section.

Section 10(l) was not mentioned in *Plasterers' Union,* but the Court's logic and language convinces us that dismissal of the section 8(b)(4)(D) claim against the union prevailing in the section 10(k) proceeding requires termination of any section 10(l) injunction against that union, leaving it free to engage in economic coercion to obtain the jobs for its members.

The Court said:

> "Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision, but both will lose their § 8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design

of the Act; Congress provided no other way to implement the Board's § 10(k) decision" (slip opinion, p. 11).[6]

This language contemplates that the union prevailing in the section 10(k) proceeding shall have the immediate right to picket a noncomplying employer. To preclude such self-help by continuing a section 10(l) injunction against the union awarded the disputed work would be inconsistent with the "design of the Act."[7]

Conversely, the section 8(b)(4)(D) charge against the Longshoremen's union remained alive because of their refusal to comply with the work assignment award. The section 10(l) injunction therefore continued against the Longshoremen's union until the Board's final adjudication of the charges against it. *See* note 4.

This result is also consistent with the statutory purpose of the Act. The principal object of section 10(k) was to settle jurisdictional disputes quickly and permanently by encouraging voluntary settlement or compliance. *NRLB v. Radio Engineers (CBS)*, 364 U.S. 573, 576-77 (1961); *see Plasterers' Union v. NLRB*, 440 F.2d 174, 182-84 (D.C. Cir. 1970), *rev'd on other grounds*, — U.S. — (December 6, 1971); *NLRB v. United Association of Journeymen*, 242 F.2d 722, 725-26 (3d Cir. 1957). *See* 2 Legislative History of the Labor Management Relations Act, 1947, at 983 (1948). There would be little incentive for the Longshoremen's union either to agree to a settlement or comply with the Board's order if its refusal would leave its members in possession of the jobs and the rival union barred from picketing. Under the employers' argument, this delay would continue until the Board completed the section 8(b)(4)(D) proceedings against the Longshoremen's union, a Court of Appeals reviewed the record and

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[6] *See also* Atleson, The National Labor Relations Board and Jurisdictional Disputes—The Aftermath of CBS, 53 Geo. L. J. 93, 142-45 (1964); Mann & Husband, Private and Governmental Plans for the Adjustment of Interunion Disputes: Work Assignment Conflict to 1949, 13 Stan. L. Rev. 5, 44-48 (1960); Farmer & Powers, The Role of the National Labor Relations Board in Resolving Jurisdictional Disputes, 46 U. Va. L. Rev. 660, 682-84 (1960).

[7] This conclusion may rest in part upon the consideration that the § 10(k) award removes any "reason to believe [the § 8(b)(4)(D)] charge is true and that a complaint should issue" against the prevailing union, and thereby removes the statutory basis for a § 10(l) injunction against that union. *See* note 3.

entered an enforcement order, and, perhaps, until a contempt proceeding was instituted and completed in the Court of Appeals.

On the other hand, permitting the prevailing Operating Engineers' union to bring economic pressure on the employers while at the same time protecting the employers from similar pressure from the Longshoremen's union would encourage the latter to seek an early accommodation. Failing that, it would at least allow the employers to assign the jobs to the employees presumptively entitled to those jobs, free of the threat of coercive section 8(b)(4)(D) reprisals from the Longshoremen's union.

This would serve one of the principal purposes of these provisions, namely, protection of a neutral employer from loss due to conflicting demands by competing unions that the employer is powerless to satisfy. *NLRB v. Radio Engineers (CBS)*, *supra*, 364 U.S. at 380-81; *Plasterers' Union v. NLRB*, *supra*, 440 F.2d at 183; *NLRB v. Local 1291, International Longshoremen's Association*, 345 F.2d 4, 10 (3d Cir. 1965). *See* H.R. Rep. No. 245, 80th Cong., 1st Sess. 23-24 (1947); 1 Legislative History of the Labor Management Relations Act, 1947, at 314-15.

To recapitulate, the "final adjudication" of the dispute as to the Operating Engineers' union occurred when the work was awarded to its members in the section 10(k) proceeding; dismissal of the unfair labor practice charges then followed as a matter of course. *NLRB v. Plasterers' Union*, *supra*, ___ U.S. at ___ (slip opinion, p. 10). The section 10(l) injunction ceased to be effective as to that union by the terms of the statute, since there was a "final adjudication *of the Board* with respect to [the] matter." *Sears, Roebuck & Co. v. Carpet Layers Union*, *supra*, 397 U.S. at 658-59. Court of Appeals review was not necessary since the statute refers to final adjudication "of the Board." *Id.* at 658. The Operating Engineers' union was free to enforce the section 10(k) award by economic coercion because such pressure would be pursuant to an "order or certification of the Board" and thus not in violation of section 8(b)(4)(D). *NLRB v. Plasterers' Union*, *supra*, ___ U.S. at ___ (slip opinion, p. 10 n. 19).

The district court therefore erred in denying the motion of the Operating Engineers' union to eliminate that union from the section 10(l) injunction. The Board has since decided the section

8(b)(4)(D) proceedings against the Longshoremen's union (*see* note 4). By the terms of the statute, the injunction has expired as to that union as well. *See Sears, Roebuck & Co. v. Carpet Layers Union, supra,* 397 U.S. at 657.

Turning to No. 26,529, we conclude that we are without jurisdiction to review either the refusal of the Board to stay its section 10(k) determination, or the dismissal of the employers' charges against the Operating Engineers' union.

As noted earlier, this court has dismissed the petition of the employers to review the section 10(k) award for want of jurisdiction on the authority of *NLRB v. Longshoremen's Union,* 378 F.2d 33, 35-36 (9th Cir. 1967). *See also NLRB v. Local 991, International Longshoremen's Association,* 332 F.2d 66, 70-71 (5th Cir. 1964). Under these authorities the section 10(k) award is an interlocutory order reviewable only in the course of review of any subsequent final order under section 8(b)(4)(D). Thus, to countenance immediate review of an order denying a stay of such a section 10(k) award would doubly offend the deeply entrenched policy against premature and piecemeal appellate proceedings.

The employers urge countervailing considerations in favor of requiring judicial confirmation of the Board's section 10(k) award before it becomes binding, emphasizing that the Board should not rely on economic sanctions by the prevailing union in the section 10(k) proceeding to enforce the Board's order. Their position, however, cannot withstand the Supreme Court's analysis in *Sears* and *Plasterers' Union,* discussed above.

The employers' effort to obtain review of the dismissal of charges against the Operating Engineers' union must also be rejected.

We held in *Lewis v. NLRB,* 249 F.2d 832, 838 (9th Cir. 1957), *aff'd* 357 U.S. 10, 15-16 (1958), that "[b]y virtue of Section 3(d) . . . the General Counsel['s] . . . decision on whether to issue a complaint charging an unfair labor practice is final and not reviewable by either the Board or the Courts." *See also Department & Specialty Store Employees Union, Local 1265 v. Brown,* 284 F.2d 619, 626 (9th Cir. 1960); *California Association of Employees v. Building & Construction Trades Council,* 178 F.2d 175,

178 n.3 (9th Cir. 1949).[8] The Supreme Court confirmed this view in *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), stating, "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."[9]

In No. 26,468 the injunction is vacated as moot. In No. 26,529 the petition for review is dismissed for want of jurisdiction.

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[8]Other Courts of Appeals have adhered to this view. *See, e.g.*, Lincourt v. NLRB, 170 F.2d 306, 307 (1st Cir. 1948); United Elec. Contractors' Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966); Contractors' Ass'n of Philadelphia v. NLRB, 295 F.2d 526 (3d Cir. 1961); Wellington Mill Div., West Point Mfg. Co. v. NLRB, 330 F.2d 579, 591 (4th Cir. 1964); NLRB v. Bar-Brook Mfg. Co., 220 F.2d 832, 834 (5th Cir. 1955); Mayer v. Ordman, 391 F.2d 889, 892 (6th Cir. 1968); Balanyi v. Local 1031, I.B.E.W., 374 F.2d 723, 726 (7th Cir. 1967); General Drivers, etc. v. NLRB, 179 F.2d 492, 494-95 (10th Cir. 1950); Hourihan v. NLRB, 201 F.2d 187, 188 (D.C. Cir. 1952).

[9]The principle of nonreviewability of the General Counsel's dismissal of § 8(b)(4)(D) charges applies whether or not the Board has commenced proceedings under § 10(k). *See generally* Manhattan Constr. Co. v. NLRB, 198 F.2d 320, 321-22 (10th Cir. 1952).

United States Court of Appeals
for the Ninth Circuit

Filed Apr 26 1972
Wm. B. Luck, Clerk

No. 26468 and No. 26529

[Title omitted in Printing]

ORDER

Before: CHAMBERS, KOELSCH, and BROWNING, Circuit Judges

The last sentence of footnote 5 of the opinion filed March 14, 1972, is amended to read as follows:

"The Longshoremen's union filed an amicus curiae brief in No. 26,468."

The petition for rehearing is denied.

Dated: April 26, 1972.

U. S. District Court, District of Oregon
Filed Sep 10 1970
George E. Juba, Clerk

In the United States District Court
for the District of Oregon

Civil No. 69-258

Charles M. Henderson, Regional Director of Region 19
of the National Labor Relations Board,
for and on behalf of the National Labor Relations Board,

Petitioner,

vs.

International Longshoremen's and
Warehousemen's Union Local 50;
International Union of Operating Engineers Local 701,

Respondents.

ORDER AND OPINION

September 10, 1970

Petitioner's motion to eliminate the International Union of Operating Engineers Local 701 (Operating Engineers) from the effect of the Section 8(b)(4)(D) injunction issued in this case against both the International Longshoremen's and Warehousemen's Union Local 50 (ILWU) and the Operating Engineers is denied.

Dated this 10th day of September, 1970.

/s/ Gus J. Solomon
United States District Judge

COMMENT

SOLOMON, Judge:

I issued the injunction on May 8, 1969. Thereafter, the National Labor Relations Board awarded the crane work to the Operating Engineers. The Board has adhered to its decision despite numerous attempts by both the Longshoremen and the Pacific Maritime Association (PMA) to get the Board to set aside or delay the effective date of the decision.

The Regional Director and the Operating Engineers contend that the Board made a final determination of the dispute, and there is no need to continue the injunction. They assert that the PMA and the stevedoring companies, as well as the ILWU, have no standing to appeal the decision of the Board and that the attempted appeal by the PMA and the employer members, now pending before the Court of Appeals, is frivolous.

Both the PMA and the ILWU, pursuant to C.F.R. § 102.91, have notified the Board that they will not comply with the Board's order. Therefore, the Board is required to bring enforcement proceedings in the Court of Appeals. In the Court of Appeals the ILWU and the PMA may attempt to show that there is no substantial evidence to support the Board's work assignment order.

The action of the Court of Appeals will constitute final adjudication of the real dispute; that is, the allocation of the work between the ILWU and the Operating Engineers. *N.L.R.B. v. International Longshoremen's & Ware. U.*, 378 F.2d 33 (9th Cir. 1967).

The ILWU and the PMA assert that the Operating Engineers' victory is a pyrrhic one since the work can be performed by ILWU members using ship's gear. The Operating

Engineers say that their members will be deprived of job opportunities if they are required to wait until the Court of Appeals acts. In my view, a dissolution of the injunction before a final determination by the Court of Appeals will bring unrest to the waterfront, a situation which the Act was designed to prevent, without giving work to Operating Engineers.

Dated this 10th day of September, 1970.

/s/ GUS J. SOLOMON
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1697

PACIFIC MARITIME ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-30) is reported at 457 F. 2d 572. The opinion and order of the district court (Pet. App. 32-34) are not reported. The decision and order of the National Labor Relations Board in the related proceeding under Section 10(k) of the National Labor Relations Act are reported at 181 NLRB 315.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1972, and a timely petition for rehear-

ing was denied on April 26, 1972. The petition for a writ of certiorari was filed on June 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a dismissal of an unfair labor practice complaint against a union is reviewable by the court of appeals when the complaint, which charged the union with improperly engaging in strike activity to enforce its demands in a jurisdictional dispute, has been mooted by the Board's determination that the union's members were entitled to the work at issue.

2. Whether the Board's denial of a stay of its determination in favor of one of the parties to a jurisdictional dispute is reviewable by the court of appeals.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 1-7.

STATEMENT

In April, 1969, Brady Hamilton Stevedore Co. and W. J. Jones and Son, the employers,[1] filed an un-

[1] The petitioner Pacific Maritime Association, an employers' association, appeared for the employers in the court below (Pet. App. 24, n.5).

fair labor practice charge against Local 701 of the International Union of Operating Engineers ("Engineers") alleging that it violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in strike activity in the course of a "jurisdictional" dispute.[2] The Engineers' Union had previously filed a similar charge against Local 50 of the International Longshoremen's and Warehousemen's Union ("Longshoremen"), based on the latter's conduct in the same dispute which centered around whether longshoremen or operating engineers should drive certain cranes at the Astoria, Oregon port.

After determining that there was reasonable cause to believe that the unions were engaging in strike activity proscribed by Section 8(b)(4)(D), the Board's Regional Director consolidated the cases for purposes of hearing and determination of the underlying dispute by the Board, pursuant to Section 10(k) of the Act (Pet. App. 6). Also, pending such determination of the dispute, the Regional Director petitioned the United States District Court for the District of Oregon for temporary injunctive relief under Section 10(*l*) of the Act (Pet. App. 6-

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[2] Section 8(b)(4)(D) of the Act (Pet. App. 1) makes it an unfair labor practice for a labor union to engage in a strike or refusal to work in order to compel "any employer to assign particular work to employees in a particular labor organization * * * rather than to employees in another labor organization * * * unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

7). The district court enjoined both unions from engaging in conduct proscribed by Section 8(b)(4)(D) pending final Board adjudication. The court of appeals affirmed (Pet. App. 8-16).

Following the 10(k) hearing, the Board awarded the work in dispute to the Engineers and ruled that the Longshoremen were not entitled to engage in strike activity to force the companies represented by petitioner to assign the disputed work to them[3] (181 NLRB 315). Thereafter, the Regional Director, consistent with the Board's 10(k) determination, dismissed petitioner's unfair labor practice charge against the Engineers, which action was sustained, on appeal, by the General Counsel (Pet. App. 24).

Petitioner sought review by the court of appeals of the General Counsel's dismissal of the complaint which charged the Engineers with improperly engaging in strike activity to enforce its demands in a jurisdictional dispute. Petitioner also sought review of the Board's denial of its request to stay the 10(k) determination awarding the work to the Engineers. The court of appeals held that it was "without jurisdiction to review either the refusal of the Board to stay its section 10(k) determination, or the dismissal of the employers' charges against the Operating Engineers' union" (Pet. App. 29).[4]

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[3] A petition to review the Board's 10(k) determination was dismissed by the court of appeals for lack of jurisdiction (Pet. App. 24). Petitioner did not seek further review of that ruling.

[4] The court of appeals also vacated the order of the district court which had, pursuant to Section 10(*l*) of the Act, en-

ARGUMENT

1. The opinion of the court of appeals, upon which we principally rely, fully answers petitioner's contentions here. Petitioner's arguments (Pet. 9-16) largely ignore or misconstrue *National Labor Relations Board* v. *Plasterers' Union*, 404 U.S. 116. There, in discussing the statutory procedure for the resolution of jurisdictional disputes and the effect of a 10(k) decision, the Court said (pp. 126-127, footnote omitted):

> But the § 10(k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding; the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10(k) decision against it, a § 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed. Neither the employer nor the

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joined the Engineers' Union from engaging in strike activity to enforce its claims pending final adjudication of the Board. The district court had denied the motion by the Engineers to vacate the injunction. The appeal by the Engineers was consolidated for hearing with petitioner's application.

> employees to whom he has assigned the work are legally bound to observe the § 10(k) decision, but both will lose their § 8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's § 10(k) decision.

The Engineers, "the picketing union" here, prevailed at the 10(k) hearing. As a result, under Section 8(b)(4)(D) it would not commit an unfair labor practice if it engaged in a strike to force the employer to conform to the Board's finding that its members are entitled to the disputed jobs. The Board, therefore, properly dismissed the Section 8(b)(4)(D) charges against the Engineers, and the court of appeals properly vacated the 10(*l*) injunction barring the Engineers from engaging in otherwise prohibited activity in order to compel the employers to reinstate its employees. The decision of the court of appeals is in accord with "the design of the Act," which permits the prevailing union in a 10(k) hearing to resume picketing and "shut down the job" if the employer and the other union fail "to conform to the Board's decision" (404 U.S. at 127).[5] Indeed, the Board has recently emphasized that no other remedy is available to Engineers. *Brady Hamilton Stevedore Co.*, 198 NLRB No. 18, 80 LRRM 1611, decided July 12, 1972.

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[5] Contrary to petitioner's assertion, the language in the opinion in *National Labor Relations Board* v. *Plasterers' Un-*

Petitioner contends, however, that the dismissal of the 8(b)(4)(D) charge at this time is contrary to Section 10(k) of the Act. While that Section authorizes the dismissal of the Section 8(b)(4)(D) charge "[u]pon compliance by the parties to the [jurisdictional] dispute with the decision of the Board * * *," the statute does not preclude the dismissal of the complaint against the prevailing union where, as here, such action is warranted under Section 8(b)(4)(D). *National Labor Relations Board* v. *Plasterers' Union, supra*, 404 U.S. at 127, n. 19.

Petitioner's reliance upon *National Labor Relations Board* v. *Radio and Television Broadcast Engineers*, 364 U.S. 573, is misplaced. There it was held that under Section 10(k) "it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision" (364 U.S. at 586). The Board here complied with that mandate. The decision did not deal with the issue of the dismissal of the Section 8(b)(4)(D) charge prior to compliance by the losing party. Moreover, as the court of appeals held, the order dismissing the Section 8(b)(4)(D) charge is not appealable, and that

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ion, did not merely involve "a description of how the Board is proceeding" (Pet. 11). After setting out "the description," the Court held (404 U.S. at 127):

> This is the design of the Act. * * * We do not find that the legislative history of § 8(b)(4)(D) and § 10(k) requires a different conclusion.

court properly dismissed the petition seeking review of that action (Pet. App. 29).

2. Petitioner's contention that it should be permitted to obtain judicial review of the Section 10(k) determination was fully answered in the court below in dismissing petitioner's application to stay the Section 10(k) order (Pet. App. 29). We merely add that this issue cannot be properly asserted in this petition for a writ of certiorari. The petition of the employers seeking review of the Board's Section 10(k) decision (Pet. App. 17) was dismissed by the court of appeals on September 29, 1970 (Pet. App. 19). The order of the court of appeals here at issue denied petitioner's application to stay the Section 10(k) order, dismissed petitioner's application seeking review of the dismissal of the Section 8(b)(4)(D) charges against the Engineers' Union and vacated the Section 10(l) injunction against the Engineers. The propriety of the Section 10(k) order was no longer in issue before the court of appeals.*

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* Petitioner's contention, that the denial of appellate review of the Section 10(k) order violates its right to due process, is without merit. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301; *Lindsey* v. *Normet*, 405 U.S. 56, 77. Since the Longshoremen continued to claim the work notwithstanding the adverse 10(k) award, and the Board determined that the Longshoremen were engaging in an unfair labor practice in violation of Section 8(b)(4)(D) (Pet. App. 24, n. 4), the propriety of the Section 10(k) determination is subject to review by the court of appeals in connection with review of the 8(b)(4)(D) finding (29 U.S.C. 160(e) and (f)). Indeed, such a challenge to the 8(b)(4)(D) order is pending before the Court of Appeals for the Ninth Circuit on the Board's petition for enforcement (*National Labor Relations Board* v. *Longshoremen's Union*, No. 72-1908).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1697

PACIFIC MARITIME ASSOCIATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 50 IN REPLY TO THE BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

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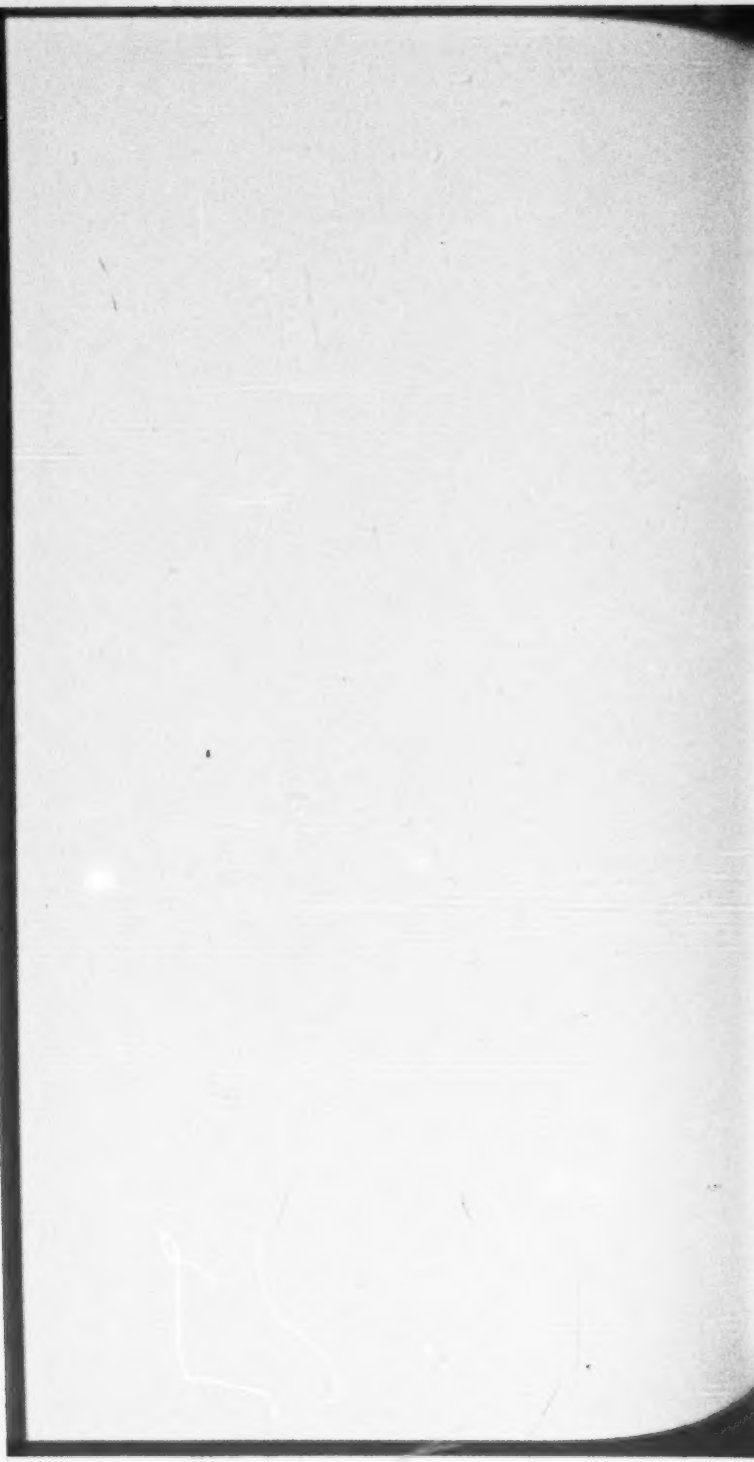

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International Longshoremen's and Warehousemen's Union, Local 50 (hereinafter "Local 50"), a party to the proceeding below, files this brief in view of the content of the Board's brief in opposition to the peti-

tion filed by Pacific Maritime Association (hereinafter "PMA").

OPINIONS BELOW

The opinion of the court of appeals is reported at 457 F.2d 572. It is set out in the appendix to the petition at 21-30. The decisions and orders of the district court are not reported. They are set out in the appendix to the petition at 32-34.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 14, 1972, and a timely petition for rehearing was denied on April 26, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether law provides judicial review of a Labor Board final order that dismissed a litigated jurisdictional dispute charge on the ground that a nonreviewable "interlocutory order" adjudicated the merits of the underlying jurisdictional dispute contrary to the position of the person filing the charge.

2. Whether the Act provides that a Labor Board order in a §10(k) proceeding to determine a jurisdictional dispute is to be made "binding" by sanctions of law so that the Board cannot enter its final ad-

judication dismissing a charge on the basis of its decision in such a proceeding before it has gained compliance by the parties to the dispute with its decision.

3. Whether descriptive language in an opinion of this Court, which purports to set forth the meaning of a statute in broad strokes, should be accepted by the lower courts as a binding interpretation of the statute when the lower court must determine the statute's meaning in an aspect not litigated before this Court.

STATEMENT

PMA, the employer, filed a jurisdictional dispute charge with the Labor Board in April, 1969. It named Local 701 of the International Union of Operating Engineers (the Engineers union) as a party to a jurisdictional dispute that had become acute. The filing of this charge required the Board to institute a proceeding under §10(k) of the Act "to hear and determine" the underlying dispute, which involved rival claims to the driving of floating cranes used in longshore work at Astoria, Oregon. Section 10(k) requires the dismissal of such a charge, without any issuance of the Board's usual "cease and desist" type order, "upon compliance by the parties to the dispute with the decision of the Board".

The Board held a vigorously contested 16-day hearing under §10(k). Local 50, PMA, and two PMA companies (Brady and Jones) participated fully in

the litigation of the underlying dispute. Thereafter, the Board entered its §10(k) order. It is unlawful for a variety of reasons. One is the Board's reliance upon an interpretation of the ILWU-PMA collective bargaining contract that not only is clearly incorrect but is directly contrary to an express award of the arbitrator on the precise issue before the Board. This action is in direct violation of federal law. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585 (1960).

On the basis of this error of law, the Board denied the claim of Local 50 and PMA that the work should be done by longshoremen. Local 50 and PMA filed petitions for review of the §10(k) order. Each was dismissed on the ground that it sought review of an "interlocutory order" that could be reviewed in court on motion of the aggrieved party only after issuance of a final order of the Board (Pet. App. 29).

The Board's §10(k) proceeding has had the support of an ancillary injunction entered under §10(1) of the Act, which is to continue in effect "pending the final adjudication of the Board". After entry of the §10(k) order, a motion was filed with the district court asking that the injunction be dissolved insofar as it restrained the Engineers union, on the ground that that union had won the §10(k) case. PMA and Local 50 opposed the motion on the ground that specific, atypical language in §10(k) of the Act prevents the Board from entering its final adjudication as to the underlying jurisdictional dispute matter until it has obtained compliance with its decision by "the

parties to the dispute" and that such adjudication might have to await judicial review of the §10(k) decision. It was pointed out that the Board's usual function of preventing unfair labor practices is not its function in jurisdictional disputes and that the unique procedure of §10(k) is directed at getting a final order that disposes of the underlying dispute. The motion to modify the injunction was denied, and an appeal was taken.

On the basis of its decision on the merits in the §10(k) proceeding in favor of the Engineers union, the Board entered an order dismissing the part of the matter consisting of PMA's charge against that union. PMA filed a petition for review of this order under §10(f) of the Act, asserting that the unlawfulness of the "interlocutory" §10(k) order rendered unlawful the order dismissing the charge, which "followed as a matter of course" (457 F.2d 572, 577; Pet. App. 28). This was an order final as to PMA. It is aggrieved thereby. Review was denied, although review of this order is the only way PMA can get review of the §10(k) order.[1]

The court of appeals also disposed of issues as to the jurisdiction of the district court to continue its injunction. It stated that this Court has "rejected the premises" of the PMA's arguments, which were

[1]Any confusion on this point is clarified on consideration of the situation where there is a charge against only one union, which is normal, and where it wins the §10(k) decision. No union then could be aggrieved by any order that it is violating §8(b)(4)(D). The Board's position is that in this situation no review of the §10(k) order is available to anyone.

that the §10(k) order is to be made binding and, hence, there had been no lawful "final adjudication" and accordingly the district court had jurisdiction to refuse to modify its injunction (457 F.2d 575; Pet. App. 26). It cites and quotes from *NLRB v. Plasterers' Union,* 404 U.S. 116 (1971). The court of appeals gave no consideration to the fact that there was no claim in *Plasterers* that the statute directs that the parties to the dispute should be made "legally bound to observe the §10(k) decision" (404 U.S. 127; Bd. Br. 6).

If no one were ever "legally bound" under the "design of the Act", Local 50 would continue to be free to use the orderly processes of collective bargaining to get the work in dispute. These include the use of the arbitrator and of the courts to gain and enforce arbitration awards, confirming the one already obtained, requiring Brady and Jones to use longshoremen to drive appropriate gear to hoist logs at Astoria from the water to shipboard if the employer loads logs at Astoria. This leaves Brady and Jones, who are bound by the collective bargaining contract, with a number of choices:

1. Stop loading logs.
2. Stop loading logs at Astoria.
3. Use ship's gear to hoist logs at Astoria.
4. Load logs at Astoria with longshoremen continuing to drive the floating crane barges.

The last alternative will not be practicable should the district court injunction be dissolved as to the

Engineers union. Its picketing could cause the companies that bring logs into Astoria to cease doing business with Brady and Jones. For this reason, the PMA asserts that the non-binding character of the §10(k) order leaves Brady and Jones in the sort of position that *CBS* carefully says was to be eliminated through the use of the §10(k) procedure.[2] It was because the Board had not acted to gain binding effect to its §10(k) order that the district court refused to modify its injunction (Pet. App. 33-34).

ARGUMENT

I.

The Board's assertion that the court of appeals correctly decided that judicial review need not be provided establishes the momentousness of the issues here presented. The Board's contention that judicial review is not guaranteed to a party to the §10(k) proceeding is supported by two cases, which are discussed below. The Board does not mention *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which upheld the constitutionality of the Act on the ground that it did provide "adequate opportunity

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[2]This Court ruled that §10(k) was to prevent "the rival unions" from applying "other forms of pressure on the employer" for the work in dispute because this would leave the employer with "the same old basic jurisdictional dispute . . . continuing to vex him". *NLRB v. Radio & Television Broadcast Engineers (CBS)*, 364 U.S. 573, 570-580 (1961).

to secure judicial protection against arbitrary action" (301 U.S. 47).[3]

PMA's claim of right to judicial review of the dismissal of its charge is based on the language of §10(k), which sets up a special and unique procedure for the Board to follow with respect to the charges arising out of jurisdictional disputes. The filing of such a charge does not give the Board its normal power to proceed with the case if, in its discretion, it deems this to be desirable. Rather, "the Board is empowered and directed to hear and determine" the jurisdictional dispute; here the dispute is as to who should drive the floating cranes used in longshore work at Astoria, Oregon. The Board carried out this duty to adjudicate the matter by holding a vigorously contested 16-day hearing in which Local 50 and PMA, Brady and Jones fully participated. This led to the

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[3] *NLRB v. Plasterers Union*, 404 U.S. 116 (1971) holds that the employer is a party to the dispute and to the §10(k) litigation. If the employer party who fully participated in the §10(k) proceeding can be denied judicial review of an order arising out of that proceeding, there is a substantial possibility that a union aggrieved by a §10(k) order and any final order based on the §10(k) will similarly be said to be without right to judicial review of the merits of the §10(k) order.

Local 50 believes that it is entitled to have the §10(k) order set aside on the ground, inter alia, that it is based on the error of law in the Board's conclusion that the ILWU-PMA contract does not require the use of longshoremen to drive whatever equipment is used to hoist logs in loading them aboard ship. The Board's orders based on its error would deprive the ILWU longshoremen of their rights under this contract. They would thus be denied the consideration they gave for their agreeing to the modernization and mechanization program that has radically changed waterfront work on the Pacific Coast so as to reduce greatly the amount of labor required to get cargoes moved. The longshoremen are entitled to due process before they can be deprived of this property.

§10(k) order here under attack. Dismissal of PMA's charge "followed as a matter of course" on the basis of the substantive holding of the §10(k) order (Pet. App. 28). Where a charge is dismissed on the basis of litigation thereon, the ordinary rule is that this order is reviewable. *Auto Workers Local 283 v. Scofield,* 382 U.S. 205, 219 (1965). Hence, the order dismissing the jurisdictional dispute charge on the ground that the §10(k) order decided the issues against PMA was open to judicial review.

The Board asserts that the employer who has participated fully in the extended litigation of the issues as to the jurisdictional dispute, which had to take place because it filed a jurisdictional dispute charge, has no right to judicial review of the merits of the resulting §10(k) order. There is some obfuscation of this point by the statement that the employer's first petition seeking review of the §10(k) order was denied on September 29, 1970 (Bd. Br. 8). Since this denial was based on the ground that the petition was premature, as seeking review of an interlocutory order, failure to petition for a writ of certiorari at that time does not waive the right to raise the issue by a timely petition as to the court of appeals opinion on the final order. There is further obfuscation by the statement that the union may get a round-about review of "the propriety of the Section 10(k) determination" in connection with the review of the §8(b)(4)(D) finding (n. 6). Whatever that concession means, this possibility in this case does not satisfy the employer's right to judicial review, or even that

of the unsuccessful union, because in many cases there is only one charge and it may be against only the union winning the §10(k) decision. Review of the final order that follows "as a matter of course" from the §10(k) order is the only assurance of review to the person who acts to commence the jurisdictional dispute hearing.

The denial of the employer's right to judicial review could stand up only if the law requires the employer to be a neutral on the merits of the §10(k) order. *Plasterers* denies that premise. PMA can be aggrieved by an order denying its claim to relief under §10(k).[4] By seeking review of the order dismissing its charge that gave rise to the §10(k) proceeding, PMA properly brought the validity of the §10(k) order before the court of appeals for review and so properly brings its claim of right to judicial review to this Court.

That right exists. There is no "clear command" that precludes review. There is no "clear and convincing evidence" of an intention to create an exception to reviewability. The ordinary inference of the right of judicial review is not negated. Compare *Barlow v. Collins,* 397 U.S. 159, 166-167 (1970).

The Board argues that no "right to due process" is involved in view of this Court's holding in *Switchmen's Union v. National Mediation Board,* 320 U.S.

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[4]The employer filing a jurisdictional dispute charge is not seeking issuance of a complaint of unfair labor practices or a cease and desist order. It usually files the charge to get an order that will permanently dispose of the jurisdictional dispute on terms acceptable to it as a non-neutral party to the dispute.

297, 301 (1943). That case denied review of a finding of fact issued under a procedure involving "no requirement as to hearings", no subpoena power, and no "order" (320 U.S. 304). The §10(k) hearing and determination procedure set up by Congress is entirely different in character from that involved in *Switchmen's Union*. The irrelevancy of that opinion to the instant case is further indicated by the enactment of the Administrative Procedure Act and 30 years of court holdings on judicial review. See *Barlow v. Collins*, 397 U.S. 159 (1970); *International Longshoremen's Association v. North Carolina State Ports Authority*, ... F.2d ....., 80 LRRM 2930 (4th Cir., June 29, 1972).

An even more far-reaching claim that an administrative adjudication depriving persons of property is free from the due process clause is made by the reliance on *Lindsay v. Normet*, 450 U.S. 56, 77 (1972). In n. 6, the Board switches from its talk of "judicial review" in the body of the brief to talk of "appellate review" in the footnote. This is prelude to its reference to the language in *Lindsay v. Normet*, at 77. This states that the due process clause does not require a state to provide appellate review of a decision reached by "a full and fair trial on the merits" in court. Thus the Board is claiming it is a court rather than an administrative tribunal.

Footnote 6 of the Board's brief in effect urges that this Court should deny the petition on the theory that the "right to due process" does not include a right to judicial review of a Labor Board order

depriving a person of his property, however arbitrary, capricious or unlawful the Labor Board order might be. The Board urges that the opinion below should be sustained despite its direct denial of judicial review of Board orders. It recognizes that this denial is based upon an entirely new proposition that judicial review of an administrative adjudication is "appellate review" and is not the original judicial consideration of the issues that has been required by constitutional law. The Board thus agrees that the opinion below overrules *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and the great body of opinions guaranteeing judicial review and the supremacy of law, as well as overruling the will of Congress as set forth in the Administrative Procedure Act.

II.

PMA claims that Congress intended that the §10(k) order be binding. PMA raises an issue of fundamental importance to the administration of the Act and a claim that there is a conflict between *CBS* and the way the Ninth Circuit applied language of *Plasterers*. On the basis of statutory language and legislative history, PMA asserts that the authority granted by the Act to the Board with respect to jurisdictional disputes is fundamentally different from that granted to it as to other matters. PMA urges that Congress provided a "way to implement the Board's §10(k) decision" by the usual court decree, which would make

the union and the employer "legally bound to observe the §10(k) decision". It asserts *CBS* requires this reading of the Act and that *Plasterers* does not hold to the contrary.

PMA argues that through such a decree the Board will get compliance by the parties to the dispute with the Board's decision as enforced by the court. Thereupon it is to enter a final adjudication dismissing the jurisdictional dispute charge. PMA claims that this "design of the Act" means that the district court retains jurisdiction to enjoin both unions from disturbing the status quo, in which the employer is free to assign the work in dispute as it chooses, until there is a new status that can be enforced upon all by sanction of law.

PMA presents an issue never before litigated in court. It asserts the Act provides this simple and direct means of adjudication with ordinary sanctions of law. The court of appeals side-stepped these fundamental issues when it found, many months after oral argument on the case on March 12, 1971, that there were some words in the *Plasterers* opinion of this Court that could be used to escape its wrestling with the issues.

III.

The due administration of justice in the federal appellate courts cannot be carried on if the courts of appeal are to give mere language of this Court the binding effect given to the *Plasterers* language in the

opinion below. The press of litigation on this Court means that this Court cannot spend the necessary time on each issue before it so as to be certain that every premise that is set out in its opinions is correct in all respects and in all circumstances.[5] As is indicated by the statements of the Justices at the American Bar Association in San Francisco this month, this Court hardly has time to be certain that its statements of its decisions on litigated points are accurate. This means that the courts of appeal must act more like courts of final resort and less like intermediate courts.

The opinion below shows a failure of the court of appeals to carry on its own independent adjudicatory action. It did not wrestle its way through the legal difficulties before it. It ignored the holdings in *Plasterers* and *CBS*, the unique aspects of the statutory language with respect to jurisdictional disputes, the legislative history regarding these disputes, and the practical problems involved.

We do not suggest the courts of appeal should not defer to a holding of this Court. However, the same deference should not be given to every statement in a Supreme Court opinion, even a unanimous opinion. This is particularly true in regard to this Court's words, as to what is assumed to be the meaning of a statute, that have been set forth in reaching a litigated conclusion on a point that is not before the court of appeals.

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[5]The Court's opinions are not written the way Congress writes statutes.

The opinion below rigorously follows words from *Plasterers* that did not develop out of the cross-fire of argument and decision.[6] It relies on these words to hold that the employer is so little affected by the §10(k) proceeding that it has no right to judicial review of the §10(k) order. They are used to support a holding that the Act requires the employer to take a neutral position with respect to "conflicting demands by competing unions that the employer is powerless to satisfy" (457 F.2d 577; Pet. App. 28). The language sanctified as gospel was not a holding on a litigated issue that is pertinent here.[7]

This Court should use this petition as a vehicle for clarifying the need for more independent and intensive adjudication on the part of the courts of appeal. To this end it should summarily remand the matter. It should direct the court of appeals to make

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[6]The Board's brief (5-6) quotes the words but omits footnote 19, which indicates the character of the basis for these words.

[7]The footnote at p. 7 of the Board's brief claims that this language was a holding that is pertinent to the issues raised by the petition. This claim is supported by the erroneous contention that the phrase "we do not find" equates with the phrase "we hold". Furthermore, this footnote improperly brings together two sentences from the opinion. An analysis of the opinion as a whole requires the conclusion that the "we do not find" sentence refers to the conclusion that the employer has the status of a party to the dispute being litigated under §10(k) so as to be entitled to protection under the Act, even when it takes a non-neutral position as to the jurisdictional dispute. Nothing like the contentions raised by PMA as to the meaning of §10(k) was litigated in *Plasterers*. It certainly did not hold that the employer is so little affected by the §10(k) proceeding that it is without right to judicial review and must accept a neutral position as to the substance of the §10(k) order.

its independent judgment of the legal issues, with the suggestion that it may wish to hear further argument as to the effect of the holding in *Plasterers*.

Respectfully submitted,

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August 25, 1972.